(5)

No. 99-1551

Supreme Court, U.S.
FILED
OCT 10 2000
CLERK

IN THE

Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF FOR RESPONDENT

DAVID M. CHRISTENSON
LOCKHEED MARTIN CORPORATION
6801 Rockledge Drive
Bethesda, Maryland 20817
(301) 897-6127

FRANCIS B. BURCH, JR.
ANTHONY L. MEAGHER
PIPER MARBURY RUDNICK & WOLFE LLP
6225 Smith Avenue
Baltimore, Maryland 21209
(410) 580-3000

MARTIN H. REDISH
PIPER MARBURY RUDNICK & WOLFE LLP
203 North LaSalle Street
Chicago, Illinois 60601
(312) 368-4000

WALTER E. DELLINGER
(*Counsel of Record*)
PAMELA A. HARRIS
SRIKANTH SRINIVASAN
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

ROBERT E. WILLETT
RICHARD W. BUCKNER
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000

Counsel for Respondent

BEST AVAILABLE COPY

4 of 42

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. FEDERAL RULE OF CIVIL PROCEDURE 41(b) CONTROLS WHETHER A JUDGMENT OF DISMISSAL IN A DIVERSITY CASE IS "ON THE MERITS" FOR CLAIM PRECLUSION PURPOSES. 6

A. The Unambiguous Terms Of Rule 41(b) "Cover The Point In Dispute" Under Hanna And Establish That The Dismissal In This Case Was "On The Merits." 8

B. Semtek's Arguments Urging That Rule 41(b) "Should Not Be Read" To Control Whether A Diversity Judgment Is "On The Merits" Are Unavailing. 15

1. Rule 41(b)'s operation is entirely consistent with the objectives of res judicata doctrine. 16

2. While Rule 41(b) determines for a state court whether a federal dismissal is "on the merits," state courts retain full discretion to apply state rules of procedure to their own proceedings. 20

3. Rule 41(b) fully applies to dismissals based on expiration of the statute of limitations 23

TABLE OF CONTENTS
(continued)

Page

4. Because Rule 41(b) controls the issue in dispute, the California rule has no application. 24
   a. Rule 41(b) and the California rule cannot both be given effect in this case, and Rule 41(b) therefore controls. 24
   b. Semtek's analysis of the state and federal interests in issue and of Erie considerations is both irrelevant and erroneous. 29
      i. Interests of first forum. 30
      ii. Interests of the second forum. 33
      iii. Federal interests. 34
      iv. Erie analysis. 36
   C. Rule 41(b) Does Not Exempt Dismissals on Statute of Limitations Grounds From "On The Merits" Treatment. 39
   D. Rule 41(b) Is Valid Under The Rules Enabling Act And The Constitution. 44

II. THE CONCLUSION THAT RULE 41(b) CONTROLS THE ISSUE IN THIS CASE IS UNAFFECTED BY DUPASSEUR v. ROCHEREAU. 46

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

CASES

Allie v. Ionata,
503 So.2d 1237 (Fla. 1987) 41

Answering Service, Inc. v. Egan,
728 F.2d 1500 (D.C. Cir. 1984) 35

Beegan v. Schmidt,
451 A.2d 642 (Me. 1982) 41

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,
402 U.S. 313 (1971) 48

Boaz v. Mutual Life Insurance Co.,
146 F.2d 321 (8th Cir. 1944) 11

Budinich v. Becton Dickinson & Co.,
486 U.S. 196 (1988) 27

Burgess v. Cohen,
593 F. Supp. 1122 (E. D. Va. 1984) 42

Burlington Northern Railroad Co. v. Woods,
480 U.S. 1 (1987) .... passim

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,
498 U.S. 533 (1991) .... passim

Byrd v. Blue Ridge Rural Electric Cooperative,
356 U.S. 525 (1958) 25, 38

Cemer v. Marathon Oil. Co.,
583 F.2d 830 (6th Cir. 1978) 12

Cone v. West Virginia Pulp & Paper Co.,
330 U.S. 212 (1947) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 10

Corrado v. Providence Redevelopment Agency,
320 A.2d 331 (R.I. 1974) 41

Costello v. United States,
365 U.S. 265 (1961) 39, 42

Creech v. Town of Walkerton,
472 N.E.2d 226 (Ind. Ct. App. 1984) 41

Dennis v. Fiscal Court,
784 S.W.2d 608 (Ky. Ct. App. 1990) 41

Deposit Bank of Frankfort v. Board of Councilmen,
191 U.S. 499 (1903) 12, 48

DeVargas v. Montoya,
796 F.2d 1245 (10th Cir. 1986), *overruled on other grounds, Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987) 41

Discount Homes, Inc. v. McFarlane,
16 Va. Cir. 306 (Va. Cir. Ct. 1989) 41

Dozier v. Ford Motor Co.,
702 F.2d 1189 (D.C. Cir. 1983) 42

Dupasseur v. Rochereau,
88 U.S. (21 Wall.) 130 (1874) ..... passim

Eastern Credit Ass'n v. Estate of Braxton,
215 A.2d 485 (D.C. 1965) 41

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Federated Department Stores, Inc. v. Moitie,
452 U.S. 394 (1981) ..... passim

First Call, Inc. v. Capital Answering Service, Inc.,
898 P.2d 96 (Mont. 1995) 41

Fluhr v. Allstate Insurance Co.,
447 N.E.2d 1254 (Mass. App. Ct. 1983) 41

Foran v. USAA Casualty Insurance Co.,
427 S.E.2d 918 (S.C. Ct. App. 1993) 41

Gardner v. LaFollette,
343 N.W.2d 830 (Wis. Ct. App. 1983) 41

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) ..... passim

Gillespie v. Johnson,
209 S.E.2d 143 (W. Va. 1974) 41

Goddard v. Security Title Insurance & Guaranty Co.,
92 P.2d 804 (Cal. 1939) 20, 30

Gonsalves v. Bank of America,
105 P.2d 118 (Cal. 1940) 35

Guidry v. Bayly, Martin & Fay,
545 So. 2d 567 (La. Ct. App. 1989) 41

Haislip v. Riggs,
534 F. Supp. 95 (W.D.N.C. 1981) 41

Hanna v. Plumer,
380 U.S. 460 (1965) ..... passim

Health Cost Controls, Inc. v. Washington,
187 F.3d 703 (7th Cir. 1999) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Heck v. Humphrey,
512 U.S. 477 (1994).....5, 21

Heiser v. Woodruff,
327 U.S. 726 (1946).....48

Hill v. Wooten,
279 S.E.2d 227 (Ga. 1981).....41

Jordan v. Kansas City,
929 S.W.2d 882 (Mo. Ct. App. 1996).....41

Kern v. Hettinger,
303 F.2d 333 (2d Cir. 1962).....34, 35, 36

Koch v. Rodlin Enterprises,
223 Cal. App. 3d 1591 (1990).....30

LaBarbera v. Batsch,
227 N.E.2d 55 (Ohio 1967).....41

Lackner v. LaCroix,
602 P.2d 393 (Cal. 1979).....30

Livingston v. Estate of Bias,
673 P.2d 1197 (Kan. Ct. App. 1984).....41

Matsushita Electronic Industries Co. v. Epstein,
516 U.S. 367 (1996).....5, 34

Nasser v. Isthmian Lines,
331 F.2d 124 (2d Cir. 1964).....12

Nitz. v. Nitz,
456 N.W.2d 450 (Minn. Ct. App. 1990).....41

Northwest Airlines, Inc. v. Transport Workers Union,
451 U.S. 77 (1981).....49

TABLE OF AUTHORITIES
(continued)

Page(s)

Opinion of the Justices,
558 A.2d 454 (N.H. 1989).....41

Palmer v. Hoffman,
318 U.S. 109 (1943.....25

Partee v.Phelps,
840 S.W.2d 512 (Tex. App. 1992).....41

Pavelic & LeFlore v. Marvel Entertainment Group,
493 U.S. 120 (1989).....8, 15, 17

Penfield Co. v. S.E.C.,
330 U.S. 585 (1947).....49

Penn v. Iowa State Board of Regents,
577 N.W.2d 393 (Iowa 1998).....41

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995).....13, 40, 42

PRC Harris, Inc. v. Boeing,
700 F.2d 894 (2d Cir. 1983).....42

Ragan v. Merchants Transfer & Warehouse Co.,
337 U.S. 530 (1949).....26

Reed v. Allen,
286 U.S. 191 (1932).....19

Rein v. David A. Noyes & Co.,
665 N.E.2d 1199 (Ill. 1996).....41

Ritchey v. Upjohn Co.,
139 F.3d 1313 (9th Cir. 1998).....31

Rose v. Town of Harwich,
778 F.2d 77 (1st Cir. 1985).....41, 42

TABLE OF AUTHORITIES
(continued)

Page(s)

S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District,
60 F.3d 305 (7th Cir. 1995).....29

Santos v. Todd Pacific Shipyards Corp.,
585 F. Supp. 482 (C.D. Cal. 1984).....30

Shoup v. Bell & Howell Co.,
872 F.2d 1178 (4th Cir. 1989).....42

Shupe v. Ketting,
No. 18145-4-III, 2000 Wash. App. LEXIS 1782
(Wash. Ct. App. 2000).....41

Sibbach v. Wilson & Co.,
312 U.S. 1 (1941).....46, 49

Smith v. Russell Sage College,
429 N.E.2d 746 (N.Y. 1981).....41

Stewart Organization, Inc. v. Ricoh Corp.,
487 U.S. 22 (1988).....7, 8, 29

Stoll v. Gottlieb,
305 U.S. 165 (1938).....5

Toucey v. New York Life Insurance Co.,
314 U.S. 118 (1941).....48

Walker v. Armco Steel Corp.,
446 U.S. 740 (1980)..... passim

Willy v. Coastal Corp.,
503 U.S. 131 (1992 13

STATUTES

28 U.S.C. § 1738.....5

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 2072.....13, 44, 49

U.S. Const. Art. IV, § 1.....5

OTHER AUTHORITIES

American Bar Association, Proceedings of the Institute on Federal Rules, Cleveland, Ohio, 310 (1938).....45

Stephen R. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733 (1985).....22, 35, 36

Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L. J. 741 (1976).....22, 47, 48, 49

Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945 (1998)..... passim

Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1473 (4th ed. 1996).....35

Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L.J. 289 (1993)..... passim

8 James Wm. Moore et al., *Moore's Federal Practice* § 41.02 (3d ed. 2000).....46

18 James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 1997).....36, 37

Restatement (First) Judgments § 49 (1942).....43

Restatement (Second) Judgments (1982)..... passim

TABLE OF AUTHORITIES
(continued)

Page(s)

Restatement (Second) Conflict of Laws §§ 94-95 (1988 revisions).....5, 32

Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 1996) ..... passim

RULES

C.D. Cal. R. 14.6.....14

Fed. R. Civ. P. 1.....12

Fed. R. Civ. P. 41(a).....11, 12

Fed. R. Civ. P. 41(b) ..... passim

Fed. R. Civ. P. 59.....1, 11

Fed. R. Civ. P. 60.....12

STATEMENT OF THE CASE

This case arises out of the decision of petitioner Semtek International Inc. ("Semtek") to bring its suit against respondent Lockheed Martin Corporation ("Lockheed"), a Maryland corporation, in the California courts. The California statute of limitations had expired, prompting dismissal of the action by a federal district court sitting in diversity. Semtek then sought to file precisely the same lawsuit against Lockheed again, this time in Maryland, a forum with a more generous statute of limitations. But as the court below correctly found, the plain terms of Federal Rule of Civil Procedure 41(b) direct that the dismissal of Semtek's California action by the federal district court was "on the merits" and entitled to res judicata effect.

1. In February 1997, Semtek filed its first lawsuit against Lockheed in California state court, alleging business torts. Pet. App. 48a. Lockheed, an out-of-state defendant, removed the case to federal district court based on diversity of citizenship. *Id.*

Lockheed moved under Rule 12(b)(6) to dismiss Semtek's suit on the ground that California's two-year statute of limitations had expired. The district court granted the motion. The dismissal order specified that the action was "DISMISSED WITH PREJUDICE," Pet. App. 58a, and the judgment reiterated that the dismissal was "on the merits and with prejudice," Pet. App. 59a. Semtek raised no objection to the court's decision to enter the judgment "on the merits," and did not move to amend or clarify the judgment. *See* Fed. R. Civ. P. 59(e).

Semtek appealed the dismissal to the Ninth Circuit, but did not contend on appeal that the district court had erred by rendering the judgment "on the merits" and did not object in any way to the form of the judgment. On February 25, 1999, the Ninth Circuit affirmed the district court dismissal. Pet.

App. 3a. Semtek chose not to petition for certiorari from that judgment.

2. a. In July 1997, while its Ninth Circuit appeal was pending, Semtek filed a second lawsuit against Lockheed in the Circuit Court for Baltimore City, raising business tort claims identical to those it alleged in California. Pet. App. 3a. Lockheed sought an injunction in the California district court barring Semtek from litigating claims in Maryland that the California court had already dismissed. Pet. App. 4a. The district court declined to exercise its discretion to enjoin the Maryland litigation, observing that it was "not convinced that the single action filed by [Semtek] in Maryland rises to the level of vexatious relitigation" warranting relief under the All Writs Act, 28 U.S.C. §1651(a), and that Lockheed could assert a defense of res judicata in the Maryland proceedings. Pet. App. 71a.

b. Lockheed then filed a motion in the Maryland trial court to dismiss the Maryland action on grounds of res judicata. Opposing the motion, Semtek argued that the California district court's dismissal was not "on the merits" and thus not entitled to claim preclusive effect. The Maryland court agreed with Lockheed and granted its motion. Pet. App. 36a-47a.

The court began by identifying the Federal Rule of Civil Procedure that speaks to whether a federal dismissal is "on the merits" for preclusion purposes: Rule 41(b), which provides in relevant part that "'unless the Court in its order for dismissal otherwise specifies, a dismissal . . . other than [one] for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.'" Pet. App. 39a (quoting Fed. R. Civ. P. 41(b)). The court held that the preclusive effect of the California federal court dismissal was governed by the Federal Rule directly on point, rather than by a California common-law rule suggesting that dismissal of a claim on limitations

grounds by a state court would not be "on the merits." Pet. App. 40a-46a. And the "plain language" of Rule 41(b), the court found, made clear that the California federal court's dismissal was an "adjudication on the merits" and hence entitled to res judicata effect. Pet. App. 39a.

c. Semtek then, for the first time, moved in the California district court to amend that court's judgment – by then 18 months old – to specify that the dismissal was *not* on the merits, which would have the effect under Rule 41(b) of changing the judgment to one without claim preclusive consequences. With full knowledge that the Maryland action had been dismissed on the basis of claim preclusion, the district court declined to change its judgment. The Ninth Circuit also denied Semtek's motions. Pet. App. 11a-12a.

3. Semtek appealed the Maryland trial court judgment dismissing the Maryland action on res judicata grounds. The Maryland Court of Special Appeals affirmed, agreeing with the trial court that Federal Rule 41(b), and not California res judicata law, governed whether the federal court dismissal was "on the merits" for preclusion purposes. Pet. App. 12a-16a, 19a-21a, 23a-30a. The court accordingly found that the district court's dismissal "was a judgment on the merits and was entitled to . . . preclusive effect." Pet. App. 34a. The Maryland Court of Appeals denied certiorari.

SUMMARY OF ARGUMENT

Semtek presents this case as one about federalism and *stare decisis*. It is not. This case is about textualism and nothing more – in particular, the plain text of Federal Rule of Civil Procedure 41(b). This Court gives the Federal Rules of Civil Procedure their plain text meaning, *see, e.g., Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 540-41 (1991), and the terms of Rule 41(b) squarely govern this case: the federal court dismissal of Semtek's California suit was "an adjudication upon the merits," Fed. R. Civ. P. 41(b), and thus is entitled to claim pre-

clusive effect. Semtek's indiscriminate array of arguments asserting that the terms of Rule 41(b) do not control, some of which would require no less than simply reading the Rule out of the Rules of Civil Procedure altogether, are unavailing. And *Hanna v. Plumer*, 380 U.S. 460 (1965), long ago established that where a Federal Rule of Civil Procedure addresses the issue in dispute, there can be no federalism-based objection to the application of the Rule in a diversity case if, as is undisputed here, the Rule represents a valid exercise of rulemaking authority. Nor would affirming the judgment require the Court to overrule *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), or to confront any questions of *stare decisis* whatsoever. This case, in short, begins and ends with the unambiguous terms of Rule 41(b).

Semtek nonetheless defers any discussion of Rule 41(b) until the final section of its brief. Semtek starts instead with an extended discussion of *Dupasseur*, a decision issued more than 60 years before promulgation of the Federal Rules of Civil Procedure and directly linked to an era in which state procedures governed federal proceedings under the now-obsolete Conformity Act, and a decision supplanted by Rule 41(b) in respect to the precise issue in this case. Tellingly, Semtek does not contend that Rule 41(b) is inapplicable *because of* the decision in *Dupasseur*. Semtek's Rule 41(b) arguments instead concentrate, as they must, on the terms and operation of the Rule. As a result, any attempt to revive *Dupasseur* and the rule in effect prior to the establishment of the Federal Rules – *viz.*, that the preclusive effect of a federal court diversity judgment is determined by the law of the state in which the federal court sits – is entirely contingent on Semtek's ability to establish independently that Rule 41(b) fails to address whether a judgment of dismissal in a diversity case is "on the merits" for preclusion purposes. That effort, as we elaborate herein, falls well short.

ARGUMENT

The Full Faith and Credit Clause and Statute, U.S. Const. Art. IV, § 1; 28 U.S.C. § 1738, require state and federal courts to give state court judgments the same preclusive effect they would receive in the courts of the rendering State. *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996). While the judgments of federal courts do not fall within the four corners of the Clause or the Statute, "[i]t has long been established that the judgments of the federal courts are to be accorded full faith and credit when a question of their recognition arises in a state court or in another federal court." Restatement (Second) Judgments § 87 cmt. a (1982); *see, e.g., Stoll v. Gottlieb*, 305 U.S. 165 (1938). That requirement is one of federal law. *See* Restatement (Second) Judgments § 87 ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court.").

It is the content of that federal law that is in issue here – in particular, whether it consists of federal preclusion rules or instead incorporates the rules of the state in which the rendering federal court sits. *See id.* § 87 cmt. b; Restatement (Second) Conflict of Laws § 94 cmt. f, § 95 cmt. h (1988 revisions). There is no dispute in respect to federal question judgments; federal standards control their preclusive effect. *See Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994); *Stoll*, 305 U.S. at 170-75. The issue in this case concerns diversity judgments, and more specifically, one particular aspect of diversity judgments: the circumstances in which a judgment of dismissal in a diversity case is "on the merits," one of the basic elements of claim preclusion analysis.

Those elements are well established. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Because the parties and claims in

this action are identical to those in the suit dismissed by the California federal court, this case implicates only the "on the merits" issue. It raises no questions regarding whether federal or state standards control other aspects of a diversity judgment's preclusive effect, such as privity or mutuality of the parties or identity of the claims or issues. The distinction is significant, because those elements are not governed by a Federal Rule of Civil Procedure. The "on the merits" question, by contrast, is controlled by the terms of Rule 41(b).[1]

I. FEDERAL RULE OF CIVIL PROCEDURE 41(b) CONTROLS WHETHER A JUDGMENT OF DISMISSAL IN A DIVERSITY CASE IS "ON THE MERITS" FOR CLAIM PRECLUSION PURPOSES.

The question in this case is whether federal preclusion rules or state preclusion rules control when determining if the dismissal of an action by a federal court sitting in diversity is "on the merits." The choice between a federal rule and a state rule in a diversity case typically turns on the familiar *Erie* analysis, *see Erie Railroad Co. v. Tompkins*, 304

[1] The "on the merits" requirement has become somewhat mislabeled. Many types of dismissals are now accorded preclusive effect even if there has been no full-fledged merits analysis of the substance of the claims. This trend is the result of the liberalization of opportunities for amending and correcting pleadings and the increased emphasis on judicial administration and fairness to defendants. *See, e.g.*, Restatement (Second) Judgments § 19 cmt. a. The treatment of dismissals for failure to state a claim on the pleadings, which once posed no bar to relitigation but now generally preclude a subsequent action, *see Moitie*, 452 U.S. at 399 n.3; Restatement (Second) Judgments § 19 cmt. d, presents a good example. While its title has lost some of its descriptive value, the "on the merits" requirement remains an integral aspect of claim preclusion analysis, and the term "on the merits" still "often appears in statute, rule of court, case, and commentary," Restatement (Second) Judgments § 19 rep. note, including, as is especially pertinent here, in California law and in the terms of Federal Rule 41(b). The consequences of an "on the merits" judgment are the same in all jurisdictions, *i.e.*, that the judgment is entitled to preclusive effect.

U.S. 64 (1938), which generally entails evaluating the federal and state rules by reference to the dual objectives of discouraging undue forum-shopping and avoiding inequitable administration of the law. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427-28 (1996); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

But that analysis takes a back seat where, as here, a Federal Rule of Civil Procedure speaks to the issue. *See Hanna*, 380 U.S. at 469-70. The well-settled framework in cases involving a Federal Rule of Civil Procedure, established in *Hanna v. Plumer* and reiterated in a number of subsequent decisions, holds that the Rule controls in a diversity case if it "cover[s] the point in dispute" and infringes "neither the terms of the [Rules] Enabling Act nor constitutional restrictions." *Hanna*, 380 U.S. at 470-71; *see Gasperini*, 518 U.S. at 427 n.7; *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 4-5 (1987). In those circumstances, "the Federal Rule applies regardless of contrary state law." *Gasperini*, 518 U.S. at 427 n.7. It is only if the Federal Rule does not "cover[] the point in dispute" that the "'relatively unguided'" *Erie* inquiry might become relevant. *Hanna*, 380 U.S. at 470-71; *see Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26-27 & n.6 (1988).

The framework established in *Hanna* governs the analysis in this case. Accordingly, the question for the Court is whether Federal Rule of Civil Procedure 41(b) covers the point in dispute and represents a valid exercise of rulemaking authority under the Rules Enabling Act and the Constitution. *Hanna*, 380 U.S. at 470-71. If so, the Rule "applies regardless of contrary state law," *Gasperini*, 518 U.S. at 427 n.7, and there is no need to resort to an *Erie* analysis, *see Hanna*, 380 U.S. at 469-70. *See* 19 Charles Alan Wright et al., *Federal Practice and Procedure* ("Wright & Miller") § 4508, at 248-49 (2d ed. 1996).

Semtek turns the inquiry upside-down. It begins by introducing and defending the pre-Federal Rules standard of *Dupasseur* according to considerations generally relevant to *Erie* analysis and irrelevant under *Hanna*, such as the effect on forum-shopping and equitable administration of the law and the weight of state and federal interests. *See* Pet. Br. 11-28. Semtek only afterward turns to examining whether Rule 41(b) addresses the issue in this case. *Id.* at 34-50. The latter question comes first, however, *see, e.g., Stewart Org.*, 487 U.S. at 27 n.6; 19 Wright & Miller § 4504, at 47-48, and it is dispositive here.

A. The Unambiguous Terms Of Rule 41(b) "Cover The Point In Dispute" Under *Hanna* And Establish That The Dismissal In This Case Was "On The Merits."

The first question under *Hanna* is whether the Federal Rule in issue "cover[s] the point in dispute," *Hanna*, 380 U.S. at 470, which calls for a determination of "whether, when fairly construed, the scope of [the] Federal Rule . . . is sufficiently broad to . . . control the issue before the court," *Burlington Northern*, 480 U.S. at 4-5 (internal quotation marks omitted). This case presents no difficult issue on that score. The straightforward terms of Rule 41(b) control whether a federal court dismissal, including in a diversity case, is "on the merits." Indeed, the Rule admits of no other interpretation.

1. This Court "give[s] the Federal Rules of Civil Procedure their plain meaning. As with a statute, [the] inquiry is complete if" the Court "find[s] the text of the Rule to be clear and unambiguous." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 540-41 (1991) (internal quotation marks omitted); *see Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980). The terms of Rule 41(b) are "clear and unambiguous," and they squarely address the circumstances in which a federal dismissal is "on the merits."

The Rule's title makes explicit that it governs the "effect" of an involuntary dismissal, *see* Fed. R. Civ. P. 41(b) (entitled "Involuntary Dismissal: Effect Thereof"), and the Rule describes that effect as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, *operates as an adjudication upon the merits*.

Id. (emphasis added). The evident purpose of the Rule, as its title signals, is to establish clearly the "effect" of a dismissal regarding whether it "operates as an adjudication upon the merits" for preclusion purposes. *Id.*; *see* 9 "Wright & Miller" § 2373.

The Rule divides involuntary dismissals into three groups: (1) dismissals "for lack of jurisdiction, for improper venue, or for failure to join a party"; (2) dismissals "under this subdivision," *i.e.*, for "failure of the plaintiff to prosecute or to comply with these rules or any order of the court" (so-called "penalty dismissals"); and (3) "any dismissal not provided for in this rule." Because a judgment for the defendant generally entails a dismissal of the action, the third, all-purpose category of "any dismissal not provided for in this rule" encompasses summary judgments under Rule 56, judgments dismissing the action for failure to state a claim

under Rule 12(b)(6), and most means by which a defendant obtains judgment in its favor.[2]

The Rule is straightforward in its operation and clear in its consequences. The general rule, which applies both to the catch-all category of "any dismissal not provided for in this rule" and to the category of penalty dismissals "under this subdivision," is that the judgment "operates as an adjudication upon the merits" unless "the court in its order otherwise specifies." Fed. R. Civ. P. 41(b). The Rule thus erects a default presumption that those dismissals are "on the merits" absent a contrary specification by the court, which typically would take the form of a statement that the dismissal is "without prejudice" to a subsequent action. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (dismissal "without prejudice" is "a dismissal that does not operate as an adjudication upon the merits and thus does not have a res judicata effect") (internal quotation marks omitted). But the Rule categorically excepts from "on the merits" treatment the three types of dismissals in the remaining category – for "lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19." Fed. R. Civ. P. 41(b). Dismissals on those three grounds only preclude relitigation of the same issue, but can never have claim preclusive effect. *See* 9 Wright & Miller § 2373, at 411-12; Restatement (Second) Judgments § 20 cmt. d. In short, a dismissal for one of those three reasons is never "on the merits," whereas all other dismissals are "on the merits" unless the court says otherwise.

---

[2] *See Health Cost Controls, Inc. v. Washington*, 187 F.3d 703, 706 (7th Cir. 1999) (per Posner, C.J.) ("A judgment in favor of a plaintiff is a statement of the relief [being] ordered; if in favor of the defendant, it is ordinarily a statement that the plaintiff's suit is being dismissed; in either case the judgment is the bottom line. Summary judgment is not relief. It is merely a procedural premise for relief. The relief is whatever the party moving for summary judgment was seeking and the court agrees the party is entitled to.") (citations omitted).

The treatment of voluntary dismissals in a different section of Rule 41 – Rule 41(a) – informs the rationale behind the Rule's treatment of involuntary dismissals under Rule 41(b). Rule 41(a) allows for three types of voluntary dismissals: by the plaintiff prior to service of a responsive pleading, by a stipulation signed by all the parties thereafter, or by order of court at any time. In light of the circumstances that typically attend a voluntary dismissal, Rule 41(a) establishes the opposite default presumption from Rule 41(b), *i.e.*, that a voluntary dismissal is "without prejudice" to a subsequent action unless otherwise specified. *See* Fed. R. Civ. P. 41(a)(1)-(2). Both Rule 41(a) and Rule 41(b) thus serve the beneficial purposes of establishing an appropriate default rule, of affording the rendering court discretion to tailor the preclusive effect of a dismissal to the circumstances of the case, and of making unmistakably clear both to litigants and to construing courts whether a dismissal is to be considered "on the merits" in a subsequent action.

2. The "on the merits" consequences of a dismissal under Rule 41 are not permanently cast in stone upon entry of the judgment. Federal Rule of Civil Procedure 59(e) provides for "motion[s] to alter or amend a judgment." Rule 59(e), in fact, was added to the Code specifically to authorize a court to designate after a dismissal has been entered whether the judgment is "with prejudice" or "without prejudice" or to reverse any such specification already made.[3]

---

[3] The Advisory Committee Notes reveal that Rule 59(e) was added in response to the decision in *Boaz v. Mutual Life Insurance Co.*, 146 F.2d 321 (8th Cir. 1944), and to "make[] clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry." Fed. R. Civ. P. 59, adv. comm. notes (1946 amendment). *Boaz* addressed the authority of a district court that had entered a judgment of dismissal "without prejudice" to change the preclusive effect of the judgment (in response to a motion filed by the defendant two days later) to reflect that the dismissal was "with prejudice."

In addition, the parties can raise on appeal any questions relating to the preclusive effect of a judgment or to the district court's specification that a judgment is with or without prejudice, with review generally conducted under an abuse of discretion standard. *See* 9 Wright & Miller § 2376. Finally, Rule 60 allows motions for relief from a final judgment, either on grounds of clerical mistake, Fed. R. Civ. P. 60(a), or on grounds such as inadvertence, fraud, excusable neglect, surprise, changed circumstances, or "any other reason justifying relief from the operation of the judgment," Fed. R. Civ. P. 60(b).[4]

3. While Semtek presents an array of arguments asserting that Rule 41(b) "should" be read otherwise – which we take up in detail below – a plain text reading of the Rule's unambiguous terms permits but one conclusion: the federal court's dismissal of Semtek's California action was "upon the merits" and thus is entitled to claim preclusive effect.

To begin with, the plain terms of the Rule suggest no limitation on its application that might be thought to encompass the dismissal in this case. In particular, there is no suggestion in the text that dismissals in diversity cases somehow fall outside the scope of the Rule. To the contrary, the Rule speaks in general terms of "an action," Fed. R. Civ. P. 41(a)(1)-(2), 41(b), the Federal Rules broadly govern "*all* suits of a civil nature," Fed. R. Civ. P. 1 (emphasis added), and the Rules Enabling Act presumes that the Rules apply

---

[4] Except in highly unusual circumstances, a party seeking to alter the preclusive effect of a judgment must obtain relief from the rendering court or on appellate review. *See Deposit Bank of Frankfort v. Board of Councilmen*, 191 U.S. 499, 512 (1903); Restatement (Second) Judgments § 80 cmt. a (stating "the general principle that relief from a judgment should be sought in the court that rendered the judgment"). Courts have applied that principle in cases involving dismissals controlled by Rule 41(b). *See Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 n.1 (6th Cir. 1978); *Nasser v. Isthmian Lines*, 331 F.2d 124, 127-28 (2d Cir. 1964).

generally to "cases in the United States district courts," 28 U.S.C. § 2072(a). "This expansive language contains no express exceptions and indicates a clear intent to have the Rules . . . apply to all district court civil proceedings." *Willy v. Coastal Corp.*, 503 U.S. 131, 134-35 (1992); *see* 19 Wright & Miller § 4508, at 238 (referring to "the objective, embodied in the Federal Rules and endorsed by statute, of a uniform procedural system applicable in all civil actions in the federal courts *regardless of the basis of subject-matter jurisdiction*") (emphasis added). In fact, this Court has assumed that Rule 41 applies in diversity cases. *See Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 & n.5 (1947) (stating in diversity case that plaintiffs could voluntarily dismiss without prejudice pursuant to Rule 41(a)).

The particular ground of the dismissal entered by the California district court – the expiration of the statute of limitations – does not implicate any of the three blanket exceptions from "on the merits" treatment, *viz.*, dismissals for lack of jurisdiction, for improper venue, or for failure to join a party. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) ("a dismissal on statute-of-limitations grounds" is "a judgment on the merits") (citing Rule 41(b)).[5] As a result, "[u]nless the court in its order . . . otherwise specifie[d]," the dismissal "operate[d] as an adjudication upon the merits." Fed. R. Civ. P. 41(b). Far from "specifying otherwise," the district court made expressly clear in its order – to the point of twice highlighting the language in block capital letters – that the matter was "DISMISSED WITH PREJUDICE." Pet. App. 58a. And the court reiterated in its judgment in unmistakable language that the action was "dismissed in its entirety on the merits and with prejudice." Pet. App. 59a.

---

[5] Semtek's contention that a dismissal on statute of limitations grounds constitutes a "dismissal for lack of jurisdiction" is without merit. *See infra* § I.C.

Despite having received ample notice of the preclusive effect of the dismissal, Semtek did not object to the court's decision to render the dismissal "with prejudice," *see* C.D. Cal. R. 14.6, and did not file a motion under Rule 59(e) to alter or amend the judgment.[6] In its appeal to the Ninth Circuit, moreover, Semtek made no contention that the district court erred by entering the judgment "on the merits," and raised no questions regarding the preclusive effect of the judgment. Semtek also elected not to petition for certiorari from the Ninth Circuit's affirmance of the district court's "on the merits" dismissal.

Indeed, Semtek took no action in respect to the district court's dismissal until after its subsequent action in Maryland state court already had been dismissed on res judicata grounds. At that point, Semtek filed motions in both the Ninth Circuit and the district court seeking to reverse the preclusive effect of the dismissal to one without prejudice, alleging that the judgment reflected a "clerical" mistake. *See* Pet. App. 11a. Those courts, with full knowledge that the Maryland action had been dismissed on account of the California district court judgment, denied Semtek's motions. Accordingly, the Maryland Court of Special Appeals had no choice but to find, under the unambiguous and controlling terms of Rule 41(b), that the district court dismissal was "an adjudication upon the merits" and thus preclusive of the current action. Fed. R. Civ. P. 41(b).

---

[6] Semtek's suggestion that it was not afforded any opportunity to object to the judgment is puzzling. *See* Pet. Br. 4-5. Semtek appears to suggest that it had no opportunity to object to the judgment *before* it was entered; but Rule 59(e) and the applicable Local Rule allow for filing a motion to alter the judgment *after* its entry.

B. Semtek's Arguments Urging That Rule 41(b) "Should Not Be Read" To Control Whether A Diversity Judgment Is "On The Merits" Are Unavailing.

Semtek contends that Rule 41(b) "should not be read as deciding" whether a federal diversity judgment is "on the merits" and hence claim preclusive. Pet. Br. 34. Semtek presents an array of arguments in support of that proposition in essentially undifferentiated fashion, some of which suggest that Rule 41(b) should not be read to apply in any case at all, some of which suggest that Rule 41(b) should not be read to apply when the recognizing forum is a state court, some of which suggest that Rule 41(b) should not be read to apply to dismissals on statute of limitations grounds, and some of which suggest that Rule 41(b) should not be read to apply in this case in view of the significant state interests ostensibly involved. *See* Pet. Br. 34-44.

Those arguments share a common failing, one that undermines them at the very outset. The question for the Court is not, as Semtek would have it, how Rule 41(b) "should be read." The question is what the Rule in fact says. *See Business Guides*, 498 U.S. at 549 ("[O]ur task is not to decide what the [Federal Rule] should be, but rather to determine what it is."); *Pavelic & LeFlore*, 493 U.S. at 126. As to the latter question, the terms of Rule 41(b) are unambiguous, and they explicitly control when a federal court dismissal "operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b). Semtek's various arguments suggesting how the Rule "should be read" do not demonstrate otherwise.

Those arguments share another shortcoming. While each contends that Rule 41(b) "should not be read" to control in this case, none directs that the governing rule should be the one urged by Semtek, *i.e.*, that the preclusive effect of a diversity judgment should be measured by the law of the state in which the diversity court sits. Most, in fact, draw no dis-

tinction between federal question cases and diversity cases, and so cannot substantiate the diversity-specific rule pressed by Semtek. Semtek's arguments suggesting how Rule 41(b) "should be read" thus not only fail to comport with the text of Rule 41(b); those arguments also fail to support the rule Semtek favors.

1. Rule 41(b)'s operation is entirely consistent with the objectives of res judicata doctrine.

Semtek's principal attack against the application of Rule 41(b) asserts that the Rule vests too much discretion in district courts and thereby breeds excessive uncertainty. *See* Pet. Br. 9-10, 39-44. According to Semtek, because the Rule applies to nearly all dismissals in federal court, and because the Rule allows the rendering court to trump the default presumption of "on the merits" treatment by "specifying otherwise" (except in cases involving the three categorical exceptions), *see* Pet. Br. 40-41, the Rule produces excessive uncertainty and disuniformity, which is "contrary to the principles of sound judicial administration and consistency that underlie the rules of civil procedure and the doctrine of res judicata," Pet. Br. 40. That reasoning is misconceived in a number of fundamental respects.

a. The first response to Semtek's basic critique of the way in which Rule 41(b) operates is that it belongs in a proposed amendment addressed to the Advisory Committee instead of in a brief addressed to this Court. By its own terms, the argument attacks the operation of the Rule as it is written. To be sure, Semtek labels the understanding of the Rule's operation that it finds unacceptable as "Lockheed's reading of Rule 41(b)." Pet. Br. 41. But that reading is nothing more than a straightforward application of the plain terms of the Rule. Indeed, Semtek volunteers no explanation of how "Lockheed's reading" could be incorrect, and offers no alternative interpretation of the Rule's unambiguous terms. To the contrary, Semtek takes pains to emphasize that

the Rule "applies to virtually all dismissals," establishes a "default" presumption, and permits courts to overcome the default presumption "by noting that the dismissal is 'without prejudice,'" *id.* at 40-41, all of which is accurate, and all of which causes the Rule to work in precisely the fashion that Semtek deems unacceptable. Semtek simply believes that the Rule as written is a bad idea.

The scope of Semtek's attack against Rule 41(b) cannot be overstated. Semtek's disapproval of the Rule's operation pertains not just to dismissals on statute of limitations grounds, or to dismissals in diversity cases, or even to all dismissals in federal court that precede the filing of a related action in state court. Semtek's argument extends to every application of Rule 41(b) in every set of circumstances – *i.e.*, all involuntary dismissals in the federal courts – including, for instance, where the actions in both the rendering and recognizing courts exclusively raise federal questions and both the rendering and recognizing courts are federal courts. Semtek thus would have the Court simply read Rule 41(b) out of the Rules of Civil Procedure altogether. A fundamental challenge of that sort to the very desirability of Rule 41(b) as it is written cannot assist Semtek in this Court. *See Business Guides*, 498 U.S. at 548-49 ("[T]his Court is not acting on a clean slate" in respect to the Federal Rules. . . . 'Our task is to apply the text, not to improve upon it.'") (quoting *Pavelic & Leflore*, 493 U.S. at 126)).[7]

---

[7] The Wright and Miller treatise contains an argument similarly suggesting that the Rule should not be given its plain meaning, and that argument fails for the same reasons as Semtek's. The treatise submits that dismissals under the Rule should preclude relitigation of the same issue, but should have claim preclusive effect only upon an "[a]nalysis independent of the language of the rule." 18 Wright & Miller § 4435, at 334. That rationale by its own terms is at war with the text of the Rule. *See id.* at 332 ("language of the rule . . . seem[s] clear"). Because the "on the merits" element pertains only to *claim* preclusion, not issue preclusion, any rationale purporting to read the Rule as controlling only the *issue*

b. Semtek's critique of Rule 41(b), in any event, has the matter exactly backwards. Semtek conflates the problems of uncertainty that would arise in the absence of a clear rule governing whether to consider a dismissal "on the merits" *after* its entry, with the advantages of preserving discretion in district courts when deciding *before* the entry of a dismissal whether to render the judgment "on the merits." The whole purpose of Rule 41(b), and its principal virtue, is that it establishes a clear rule controlling whether the dismissal is "on the merits" following its entry for the benefit of the parties and any court adjudicating a subsequent action, while affording a district court flexibility to determine whether a dismissal should be "on the merits" in light of the particular circumstances of the case. *See* 9 Wright & Miller, § 2373, at 401-02 ("Indeed one of the most useful features of the rule is that it gives the court discretion about the effect of a dismissal and provides what the effect will be if the court fails to specify."); 18 Wright & Miller § 4413, at 106-07.

Semtek thus misses the mark entirely in invoking the notion that preclusion principles are "not amenable to loose discretionary determinations by the judiciary," Pet. Br. 43, and in seeking support in this Court's statement in *Federal Dep't Stores v. Moitie* that the "doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." 452 U.S. at 401; *see* Pet. Br. 43. The language in *Moitie* speaks to the undesirability of allowing the exercise of discretion by

---

preclusive effects of a dismissal cannot make sense of the Rule's plain terms. Indeed, the Rule specifically provides that dismissals for lack of jurisdiction, improper venue, and failure to join a party cannot "operate as an adjudication upon the merits" for claim preclusion purposes, yet all three have issue preclusive effect. *See id.* at 333. The Rule's prescription that dismissals falling outside those three categories "operate as an adjudication upon the merits" therefore necessarily pertains to claim preclusion, not issue preclusion.

the *recognizing* court, not the *rendering* court. The case addressed whether a recognizing court should have freedom to refuse to accord preclusive effect to a prior judgment based on its own conceptions of "simple justice" and "public policy." *See* 452 U.S. at 397-98. The Court rejected that suggestion, explaining that it "'would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert.'" *Id.* at 398-99 (quoting *Reed v. Allen*, 286 U.S. 191, 201 (1932)).

Accordingly, Semtek's reliance on the "principles of sound judicial administration and consistency that underlie the rules of civil procedure and the doctrine of res judicata," Pet. Br. 40, is wholly misplaced. Those principles are undermined by uncertainty over a dismissal's preclusive effect *after* its entry, not – as Semtek mistakenly believes – by the exercise of discretion in the rendering court *before* its entry. Rule 41(b) appropriately prevents the former while preserving the latter.[8]

---

[8] The same erroneous reasoning infects Semtek's submission that there "is no basis for displacing the clear and settled rules of res judicata and preclusion adopted by California and Maryland (and the forty-eight other states) in favor of [the] policy (if it can be called that) of substantial indeterminacy" expressed in Rule 41(b). Pet. Br. 43. That contention is doubly flawed. First, as just explained, the "indeterminacy" referred to by Semtek pertains to discretion in the rendering court – not the recognizing court – and so is perfectly in keeping with the objectives of res judicata doctrine. Second, the assumption that the preclusion rules adopted by states are more "clear and settled" than Rule 41(b) is incorrect. Rule 41(b) supplies a clear test for determining whether a dismissal is "on the merits," and the Rule "has been closely followed in over half the States and has had substantial impact in many others." Restatement (Second) Judgments § 19, rep. note. The preclusion rules in states that do not follow Rule 41(b), by contrast, can give rise to substantial uncertainty for the parties and construing courts. In California, for instance, the "on the merits" effect of a dismissal often remains unresolved until the *recognizing* court addresses the question, regardless of any specifica-

2. While Rule 41(b) determines for a state court whether a federal dismissal is "on the merits," state courts retain full discretion to apply state rules of procedure to their own proceedings.

Semtek contends alternatively that Rule 41(b) should not be read to control the "on the merits" treatment of a federal dismissal when the subsequent action takes place in state court. In Semtek's view, while the Rule identifies the circumstances in which a federal dismissal "operates as an adjudication upon the merits," Fed. R. Civ. P. 41(b), it fails to specify *where* the dismissal so "operates." *See* Pet. Br. 36. And "it would be odd" for the Rule to resolve whether a federal dismissal is "on the merits" when the second forum is a state court, Semtek submits, because no "decision has ever required a *state* court to apply the Federal Rules of Civil Procedure." *Id.* That rationale is flawed on several levels.

a. Contrary to Semtek's assertion, Rule 41(b) in no way requires state courts "to apply the Federal Rules of Civil Procedure." *Id.* Rule 41(b) applies instead in federal court by controlling whether a federal court's judgment of dismissal is "on the merits." State courts retain complete discretion to select and fashion rules of procedure governing their own proceedings, and they remain fully free to formulate their own rules directing when their own judgments are "on the merits."

To be sure, a state court assessing whether a prior federal dismissal was "on the merits" must make that determination by reference to Rule 41(b). But if Semtek means to suggest that the Rule cannot "apply" in state court even in that respect, Semtek is wrong. It is undisputed that federal rules control the res judicata effect of a federal judgment in federal

---

tion by the rendering court designating that its judgment is "with prejudice" or "without prejudice." *See, e.g., Goddard v. Security Title Ins. & Guar. Co.*, 92 P.2d 804, 807-08 (Cal. 1939).

question cases, including where the recognizing forum is a state court. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994). State courts therefore must consult Rule 41(b) when confronted with a prior federal dismissal of a federal question case. But Rule 41(b) "applies" in state court no differently when a recognizing state court is faced with a diversity judgment: the argument necessarily can draw no distinction between federal question and diversity cases, as it relates exclusively to the Rule's effect on the recognizing state forum (Maryland here), not, as would be the case with a rationale focused on diversity judgments, to the Rule's effect on the state in which a rendering diversity court sits (California here). Semtek's reasoning therefore is unavailing.

b. Semtek's rationale falls short for another reason. It is common ground that the preclusive consequences of a federal judgment do not fluctuate according to the forum of the subsequent action. That is, a state court must accord a federal judgment the same preclusive effect as would a federal court – regardless of the answer to the separate question of which set of rules, federal or state, determine that effect. *See* 6 Wright & Miller § 1417, at 10-11 (2000 Supp.) ("When a federal judgment is asserted in a later state court action, the state court must give it the same binding effect that it would have in the federal court that rendered it.").

Semtek endorsed that principle below, and it assumes as much here. *See* Brief of Appellant Semtek (filed Nov. 30, 1998, Md. Ct. Sp. App.), at 19 ("[A] court must give a foreign judgment no more and no less force and effect than would the court which rendered it.") (emphasis omitted). Indeed, that is the general rule in preclusion analysis, *see, e.g.*, Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L.J. 289, 315-16 (1993) ("It is generally the practice of courts faced with determining the effects of a judgment to examine the res judicata law of the rendering court."), and a contrary view could not be squared with the obligation to

accord full faith and credit to federal judgments, *see* Restatement (Second) Judgments § 87 cmt a.[9] And a regime in which the preclusive consequences of a federal judgment would vary depending on whether a second action takes place in state court or federal court would entail excessive uncertainty and unpredictability for the parties and would breed undue forum-shopping in respect to the locus of the second suit.[10]

Once it is established that state courts must accord federal judgments the same preclusive effect as would a federal court, Semtek's emphasis on where a dismissal under Rule 41(b) "operates as an adjudication upon the merits" becomes immaterial. Semtek's argument does not (and could not) suggest that Rule 41(b) cannot supply the rule for determining whether a prior federal dismissal was "on the merits" even in a recognizing *federal* court. Semtek thus allows that its rationale presents no obstacle to the application of Rule 41(b) when both the rendering and recognizing courts are

---

[9] *See also* Lilly, *supra*, at 316 ("Federal judgments are, generally speaking, entitled to the same kind of 'faith and credit' as are state court judgments . . . ."); Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L. J. 741, 744 (1976) (referring to "the clearly established rule that state courts must give full faith and credit to the proceedings of federal courts").

[10] The commentators relied upon by Semtek agree. *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 999 (1998) ("the applicable preclusion rules must be determinable [in the first forum] and must not depend on where the subsequent case is filed"); Lilly, *supra*, at 318 ("unless recognizing courts uniformly refer to the res judicata doctrines of the rendering tribunal, the initial litigants will have no reasonable means of predicting the consequences of the first suit"); Stephen R. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 797 & n.317 (1985) ("a system of preclusion rules for diversity judgments keyed to the locus of subsequent litigation would be hopeless, either because it would be unpredictable or because it would be, functionally, a sham").

federal. *See* Pet. Br. 37 n.23. But if state courts are required to accord a federal judgment the same preclusive effect as would a recognizing federal court, and the latter undisputedly applies Rule 41(b) in addressing the "on the merits" question, then state courts likewise must determine whether a federal dismissal was "on the merits" by reference to the terms of Rule 41(b). Any argument based on *where* a dismissal under Rule 41(b) "operates as an adjudication upon the merits" thus ultimately is of no assistance to Semtek.

3. Rule 41(b) fully applies to dismissals based on expiration of the statute of limitations.

Semtek also submits that Rule 41(b) should not be read to control the "on the merits" question in cases involving dismissals on statute of limitations grounds. That assertion relies exclusively on the suggestion of the Wright and Miller treatise that limitations dismissals are "too important" for their preclusive effect to be controlled by Rule 41(b), that the Rule "need mean only" that limitations dismissals have issue preclusive and not claim preclusive effect, and that a contextual, multi-factored analysis "independent" of Rule 41(b) should control whether a limitations dismissal is "on the merits." 18 Wright & Miller § 4441, at 372-73; *see* Pet. Br. 35, 37. The argument necessarily applies to all federal limitations dismissals, including in federal question cases, and including where the second forum is a federal court.

That rationale does not claim a basis in the text of Rule 41(b), as the Rule simply makes no specific mention of dismissals on statute of limitations grounds. And there is no suggestion in the treatise that limitations dismissals fall within one of the three categories of dismissals exempted from "on the merits" treatment, *viz.*, dismissals for lack of jurisdiction, improper venue, or failure to join a party. To the contrary, whereas a dismissal on those three grounds can never be "on the merits," the treatise submits that limitations dismissals sometimes warrant "on the merits" treatment, but

that the rule for identifying those circumstances should not be Rule 41(b). The argument reflects no more than an opinion of how limitations dismissals should be treated, not an effort to explain how they in fact are treated under controlling terms of Rule 41(b).[11]

4. Because Rule 41(b) controls the issue in dispute, the California rule has no application.

Semtek's final argument regarding how Rule 41(b) "should be read" relies on cases in which this Court found that there was "no Federal Rule which covered the point in dispute," and that state law governed the issue under the (therefore relevant) *Erie* test. *Hanna*, 380 U.S. at 470. Semtek's reliance on those cases is misplaced. Those decisions have no application when the terms of a Federal Rule squarely address the issue in the case. The Federal Rule controls in such circumstances, regardless of contrary state law. As a result, Semtek's analysis of the state and federal interests in issue and of the dual aims of *Erie* is inapposite. In any event, Semtek's analysis fundamentally misapprehends the state and federal interests involved in this case.

a. Rule 41(b) and the California rule cannot both be given effect in this case, and Rule 41(b) therefore controls.

In the course of explaining the inapplicability of *Erie* analysis when a Federal Rule of Civil Procedure speaks to the issue, this Court in *Hanna* distinguished a handful of previous decisions in which it had "held applicable a state rule in the face of an argument that the situation was governed by

[11] The treatise evidently would prefer a case-by-case analysis of whether a dismissal on limitations grounds is "on the merits" instead of what it characterizes as the "offhand" approach prescribed by Rule 41(b). *See id.* at 372-73. But Rule 41(b) preserves the discretion of district courts to specify that a dismissal is "without prejudice" precisely to permit case-specific tailoring of a dismissal's preclusive effect.

erned by one of the Federal Rules." *Hanna*, 380 U.S. at 470. The "holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule," the Court made clear, "but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." *Id.* Rule 41(b) "covers the point in dispute" here, however, and the line of cases distinguished in *Hanna* is of no relevance.

Semtek thus errs in relying on two such decisions, *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), and *Palmer v. Hoffman*, 318 U.S. 109 (1943). *See* Pet. Br. 38-39.[12] *Palmer*, in fact, was one of the decisions explicitly distinguished in *Hanna*. *See Hanna*, 380 U.S. at 470. *Palmer* rejected an argument that Federal Rule of Civil Procedure 8(c), which sets forth the affirmative defenses that must be alleged in an answer, also directs that the burden of proof in respect to those allegations rests with the defendant. According to the Court, "the fact that Rule 8(c) . . . makes contributory negligence an affirmative defense" does not also establish the burden of proof. *Palmer*, 318 U.S. at 117. "Rule 8(c) covers only the manner of pleading." *Id.* The separate issue "of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply" under *Erie*. *Id.* (citation omitted). *Hanna* quotes that entire passage in explaining that in *Palmer*, there was "no Federal Rule which covered the point in dispute." *Hanna*, 380 U.S. at 470.

Walker falls into the same camp. The Court based its reasoning there in large part on the fact that the decisions it

[12] Semtek also relies on *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), *see* Pet. Br. 38, but that case did not involve a Federal Rule.

had expressly distinguished in *Hanna* included *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), *see Hanna*, 380 U.S. at 470 n.12, which raised the same issue as *Walker*: whether Federal Rule of Civil Procedure 3, which provides that an action commences with filing of a complaint, also tolls a state statute of limitations in a diversity case. *See Walker*, 446 U.S. at 748-49.[13]

Under the relevant Oklahoma statute in *Walker*, the statute of limitations was tolled only upon service of the summons, not filing of the complaint. The Court found "no indication that the Rule was intended to toll a statute of limitations" or "to displace state tolling rules." *Id.* at 750-51. Instead, "Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run." *Id.* at 751. Rule 3 and the state tolling provision could "exist side by side, therefore, each controlling its own intended sphere of coverage without conflict." *Id.* at 752. That was made clear by a different Oklahoma statute, which, just like Rule 3, provided that an action in Oklahoma courts commences upon filing of a complaint. Because the two Oklahoma provisions presumably worked together in state court, Rule 3 and the Oklahoma tolling statute likewise could "both apply in federal court in a diversity action." *Id.* at 752 n.13.

In *Walker* and *Palmer*, the terms of the Federal Rule did not address the point in dispute. The Federal Rule and state rule thus both could be given effect in the case, "each controlling its own intended sphere of coverage without conflict." *Id.* at 752. Neither decision, to be sure, gave the Federal Rule an unnecessarily expansive interpretation extend-

[13] The Court's analysis in *Walker* was "heavily" influenced by "the doctrine of *stare decisis*." *Id.* at 749. Indeed, the Court not only had addressed the same issue in *Ragan*, but also had reaffirmed *Ragan* in *Hanna*. According to the Court, a "litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence." *Id.*

ing beyond its plain text and into the sphere occupied by a state rule. That is what was meant by this Court's reliance on *Walker* for its observation in a subsequent case, *Gasperini v. Center for Humanities, Inc.*, that "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies." 518 U.S. 415, 427 n.7 (1996) (citing *Walker*).

Semtek invokes that remark here, *see* Pet. Br. 38, but does not rely on it to suggest any particular interpretation of Rule 41(b).[14] Nor could Semtek suggest an alternative interpretation of Rule 41(b). The observation in *Gasperini* in no way alters the basic obligation to abide by the plain text of the Rules. In fact, *Walker*, the decision on which the remark is based, makes clear that while "the scope of the Federal Rule [must be] sufficiently broad to control the issue before the Court," that "is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed." *Walker*, 446 U.S. at 749-50 & n.9. Rather, the "Federal Rules are to be given their plain meaning. If a direct collision with state law

[14] Semtek's later (and apparently unrelated) suggestion that the Court should "hold that the phrase 'upon the merits'" in Rule 41(b) "must be determined under the law of the state in which the federal diversity court sits," Pet. Br. 44, cannot be taken seriously. That is not an interpretation of the Rule; that is outright substitution of a new rule. Although Rule 41(b) of course contains the phrase "upon the merits," the Rule explains in detail precisely when a dismissal "operates as an adjudication upon the merits," Fed. R. Civ. P. 41(b), and the test prescribed by the Rule does not approach the one proposed by Semtek. Nor does Semtek attempt to explain how the phrase "upon the merits" could suggest an intent to borrow state law in diversity cases when the same words apply equally in federal question cases. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) ("In using the phrase 'final decisions' Congress obviously did not mean to borrow or incorporate state law. 'Final decisions' is not a term like 'property,' which naturally suggests a reference to state-law concepts; and the context of its use in § 1291 makes such a reference doubly implausible, since that provision applies to all federal litigation and not just diversity cases.") (citation omitted).

arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies." *Id.* at 750 n.9.

This Court subsequently articulated that test in *Burlington Northern Railroad Co. v. Woods* as follows:

> The initial step [under *Hanna*] is to determine whether, when fairly construed, the scope of [the] Federal Rule . . . is "sufficiently broad" to cause a "direct collision" with the state law, or implicitly, to "control the issue" before the court, thereby leaving no room for the operation of that law.

480 U.S. 1, 4-5 (1987) (quoting *Walker*, 446 U.S. at 749-50 & n.9).[15] Rule 41(b), as we have explained, does not just "implicitly control the issue before the court"; it does so explicitly, and it could not do so more directly. It specifies exactly when a federal dismissal "operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b).

In addition, the Rule is "sufficiently broad to cause a direct collision" with the California rule governing statute of limitations dismissals. Significantly, unlike in *Walker* and *Palmer*, there simply is no opportunity to give effect both to Rule 41(b) and to the California rule: Rule 41(b) says that the dismissal in this case was "on the merits"; the California rule would say that it was not. Applying the California rule

---

[15] *Burlington Northern* held that Federal Rule of Appellate Procedure 38, which affords the courts of appeals discretion to assess "just damages" as a penalty for frivolous appeals, left no room for the operation in a diversity case of an Alabama law mandating imposition of a 10% penalty upon affirmance of any judgment for money damages that had been stayed pending appeal by payment of a bond. According to the Court, Rule 38's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute." 480 U.S. at 7. "Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity cases." *Id.*

would entail giving no effect whatsoever to the plain terms of Rule 41(b). *See* 19 Wright & Miller § 4510, at 41 (2000 Supp.) ("the relevant question usually can be characterized as whether the federal rule and the state rule can be applied contemporaneously").[16] Rule 41(b) thus "controls the issue before the court, thereby leaving no room for the operation of [the state] law." *Burlington Northern*, 446 U.S. at 5 (internal quotation marks omitted).

b. Semtek's analysis of the state and federal interests in issue and of* Erie *considerations is both irrelevant and erroneous.

Because Rule 41(b) covers the issue, the "Federal Rule applies regardless of contrary state law." *Gasperini*, 518 U.S. at 427 n.7. The only remaining question under *Hanna* is whether the Rule represents a valid exercise of rulemaking authority under the Rules Enabling Act and the Constitution. *See id.*; *Burlington Northern*, 480 U.S. at 5. There is thus no warrant for assessing the relative strength of the state and federal interests or for conducting an *Erie* analysis. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988) (evaluation of "whether application of federal judge-made law would disserve the so-called twin aims of the *Erie* rule" arises only "[i]f no federal statute or Rule covers the point in dispute"); *Hanna*, 380 U.S. at 470; 19 Wright & Miller § 4504, at 248. As a result, Semtek's extended treatment of those issues is inapposite. *See* Pet. Br. 15-28.

It is also incorrect. Semtek principally takes up the following subjects: (1) the interests of the state in which the diversity court sits (California); (2) the interests of the sec-

---

[16] As Chief Judge Posner reasoned in *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 60 F.3d 305 (7th Cir. 1995), "the state rule [must] give way" if "both" the state and federal rules "cannot be applied to the same case." *Id.* at 312; *see Gasperini*, 518 U.S. at 427 n.7 (citing favorably the discussion in *S.A. Healy Co.*).

ond state forum (Maryland); (3) the federal interests; and (4) the dual aims of *Erie*. Even if those considerations were at all relevant to the disposition of this case, Semtek's analysis is flawed at every turn.[17]

i. Interests of first forum. In suggesting that the Court should interpret Rule 41(b) to avoid conflicting with ostensibly important state policies (but not offering any specific interpretation of the Rule), Semtek focuses on what it perceives to be California's interests. *See* Pet. Br. 38. According to Semtek, "California has deliberately provided that a statute-of-limitations dismissal does not preclude suit in another state with a longer limitations period." *Id.*

That is flatly incorrect, both in respect to California's rule and in respect to California's interests. The case announcing the California rule, and the only one to squarely address the issue, demonstrates why.[18] *Koch v. Rodlin Enter.*, 223 Cal. App. 3d 1591 (1990), involved plaintiffs whose first suit seeking to rescind a contract had been dismissed by a California court based on expiration of the statute of limitations. The same plaintiffs then filed another suit in California court arising out of the same transaction, but this time

[17] Semtek also submits that its preferred rule respects state law choices concerning res judicata principles, *see* Pet. Br. 16-19, but the discussion principally concerns elements of preclusion analysis not at issue here, such as mutuality of the parties.

[18] Semtek also cites two other California decisions in support of California's rule, but neither addresses whether a dismissal on statute of limitations grounds is "on the merits" for preclusion purposes. *See* Pet. Br. 6 (citing *Lackner v. LaCroix*, 602 P.2d 393 (Cal. 1979), and *Goddard v. Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806 (Cal. 1939)). The California Supreme Court has yet to consider the issue. Prior to the California Court of Appeal decision in *Koch*, a federal district court had concluded that a statute of limitations dismissal is a judgment "on the merits" under California law. *See Santos v. Todd Pacific Shipyards Corp.*, 585 F. Supp. 482 (C.D. Cal. 1984). *Koch* opined that *Santos* was "wrongly decided." 223 Cal. App. 3d at 1596.

alleging a new legal theory, common law fraud. *See id.* at 1597. The court held that the dismissal on limitations grounds was not "on the merits" and therefore not res judicata as to the second action. *See id.* at 1595. In reaching that conclusion, the court not once alluded to any interest in preserving the plaintiffs' ability to file the same action in another state within that state's limitations period. To the contrary, the court's evident purpose was to permit the plaintiffs to assert a different legal theory arising out of the same factual circumstances in a subsequent California action without being barred by res judicata.[19] *See Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (9th Cir. 1998) (describing *Koch*).

California thus in no way has "deliberately provided that a statute-of-limitations dismissal does not preclude suit in another state with a longer limitations period." Pet. Br. 38. Semtek conflates California's res judicata rule with Maryland's choice-of-law rule. The California rule is *intra*jurisdictional, and concerns the ability of a party to allege a *different* legal theory in *California* courts following a dismissal on limitations grounds. The rule is not *inter*jurisdictional, and so does not concern the ability of a party to allege the *same* legal theory in *non-California* courts following a dismissal on limitations grounds. It is *Maryland* – not California, as Semtek mistakenly believes – that elects to follow a choice-of-law rule "under which a statute-of-limitations dismissal . . . does not preclude suit in a different jurisdiction where it is timely under" the jurisdiction's own limitations period. Pet. Br. 5; *see* Restatement (Second) Conflict of Laws § 142 (1988 revisions). California, of course, could not require Maryland (or any other state) to apply that

[19] The plaintiffs of course could not present the *same* legal theory again in California. A dismissal on statute of limitations grounds would at least have issue preclusive effect regarding whether the applicable limitations period had expired.

choice-of-law rule in the Maryland courts, and would have no cognizable state interest in doing so.[20]

The California rule, then, is not at all "directly on point," and was not at all "adopted to govern precisely a case such as this." Pet. Br. 33 n.21. Semtek filed claims in California alleging breach of contract, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and conspiracy. *See* Pet. App. 2a. After those claims were dismissed on limitations grounds, Semtek filed suit in Maryland alleging exactly the same four legal theories. *See* Pet. App. 3a. Whereas California's rule pertains to a second action sounding in a *different* legal theory and filed *in California*, Semtek's second action sounds in the *same* legal theories and was filed *elsewhere*. This case simply implicates no interest underlying the California rule.[21]

---

[20] Semtek relies on outdated provisions of the Restatement governing the choice-of-law principles applicable to statute of limitations dismissals. *See* Pet. Br. 33-34 (citing Restatement (Second) Conflict of Laws §§ 142-143 (1971)). The new provision – which followed "extensive deliberations about the statute of limitations," Restatement (Second) Conflict of Laws, Foreword (1988 rev.) – narrows the circumstances in which states should allow suit after a prior action has been dismissed on limitations grounds in another jurisdiction, and generally moves away from treating statutes of limitations as procedural for choice of law purposes. *See generally id.* § 142 (1988 rev.).

[21] Semtek's misunderstanding of the California rule leads it even further astray. Semtek asserts that "California law would permit the second lawsuit to proceed," Pet. Br. 5, and that giving res judicata effect to the federal dismissal would "accord greater preclusive effect to a dismissal pursuant to California's statute of limitations . . . than California would give a dismissal by one of its own courts," *id.* at 24. That is incorrect. Because Semtek's second action raised the very same legal theories as its first, that action would have been precluded in the California courts. *See* note 19 *supra*.

ii. Interests of the second forum. Semtek's account of Maryland's interests likewise misses the mark. According to Semtek, applying Rule 41(b) "would invade the prerogative of [Maryland] to afford a plaintiff the opportunity to try her claims within the state's limitations period . . . where the earlier dismissal is based, as here, on limitations." Pet. Br. 22.

That analysis simply assumes away the question in this case. Maryland's interests are necessarily contingent on the rendering forum's preclusion rules: if the rendering jurisdiction considers limitations dismissals to be "on the merits," Maryland would be bound by full faith and credit to grant a limitations dismissal preclusive effect, no matter how much Maryland might wish that a second suit could go forward. Maryland's interests, that is, can only extend to "afford[ing] a plaintiff the opportunity to try her claims within the state's limitations period . . . where the earlier dismissal is based, as here, on limitations" *and is not on the merits*. Pet. Br. 22. So understood, Maryland's ability to effectuate its interests cannot be a *reason for* deciding between Rule 41(b) and California law. Instead, Maryland's ability to effectuate its interests is necessarily a *product of* that determination.

Semtek's rationale also fails on a more fundamental level. It appears to assume that imposing any sort of requirement on state courts to determine the preclusive effect of a federal judgment by reference to a federal rule would violate a state court's "prerogative[s]" in the area. Pet. Br. 22. Any such rationale would prove far too much. What Semtek seeks to impose on recognizing state courts is *also* a federal preclusion rule; it is just a different rule. The rule Semtek proposes would require all recognizing courts, including state courts, to measure the res judicata effect of a diversity judgment by reference to the rules of the state in which the rendering federal court sits. Leaving aside the merits or demerits of that specific rule, the point here is that the rule is necessarily one of federal law – in particular, fed-

eral common law arising from a decision of this Court – and it would equally trump a recognizing state court's discretion in determining the preclusive effect of a diversity judgment.

The question for the Court, then, is not *whether* a federal rule should determine the preclusive consequences of a federal judgment in a recognizing state court. The question is *what* should be the federal rule. And whatever may be the correct answer in respect to other aspects of preclusion analysis – none of which is directly controlled by a Federal Rule of Civil Procedure – the answer in respect to the "on the merits" element resides in the plain text of Rule 41(b).

iii. Federal interests. Semtek discounts the important federal interests at stake to the point of writing them off altogether. *See* Pet. Br. 25-28. That is wholly unwarranted. "[A] judgment court usually has a preemptive interest in applying its own rules of res judicata." Lilly, *supra*, at 307. That remains fully the case when the judgment court applies a different jurisdiction's substantive law. *See id.* at 326 ("Regardless of what substantive law, federal or state, controlled the claims and defenses in the suit, federal law should control the effects of a federal judgment."); Erichson, *supra*, at 1002-04. The general rule in choice-of-law and preclusion analysis holds that the preclusion rules of the forum control regardless whether the forum applied its own substantive law. Lilly, *supra*, at 326. The same rule governs when a state court decides a federal question: a federal court generally determines the preclusive effect of a state court judgment on a federal question by reference to the preclusion rules of the rendering state court. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

The emphasis on the forum court's preclusion rules stems from the forum's substantial interests in the area. The forum has a substantial finality interest in defining the contours of its judgments. *See Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962) ("One of the strongest policies a court can

have is that of determining the scope of its own judgments."); Restatement (Second) Judgments § 87 cmt. b (finality interests "go to the essence of the judicial function"). And the forum's preclusion rules reflect a considered balancing of a number of policies affecting the litigation strategy and behavior of parties in its courts. *See* Erichson, *supra*, at 999-1000, 1007; Lilly, *supra*, at 313. The policies of "conserving judicial resources and preventing use of the courts as instruments of harassment," for instance, are "the business of the forum court." *Answering Serv., Inc. v. Egan*, 728 F.2d 1500, 1507 (D.C. Cir. 1984) (Scalia, J., concurring). Because failure to enforce the forum's preclusion rules would undermine the forum's policies, "the federal judicial system has a legitimate interest in the litigation incentives created by federal preclusion law." Erichson, *supra*, at 1007.

The federal interests underlying federal preclusion law are particularly evident when formally expressed and codified in a Rule of Civil Procedure. *See* Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1473 (4th ed. 1996) ("where the federal court finds some affirmative federal policy with respect to preclusion – at least one that is embodied in the Federal Rules of Civil Procedure – that policy governs even if the case is a diversity case"); Lilly, *supra*, at 319-20 (Federal Rules "not only reflect strong federal policies, but they also represent formal enactments founded on Congressional authority"). For instance, there is a strong federal interest in ensuring that dismissals for failure to prosecute or to abide by court procedures and rulings are given the intended preclusive effect under Rule 41(b), or else they would lose all effectiveness. *See Kern*, 303 F.2d at 340; Burbank, *supra*, at 783. The Rule therefore controls in those circumstances even if state law, such as in California, *see Gonsalves v. Bank of America*, 105 P.2d 118 (Cal. 1940), provides that dismissals for failure to prosecute are not "on the merits."

The same logic extends to all dismissals under Rule 41(b). Rule 41(b) embodies the substantial interest of federal courts in defining the scope of their own judgments. *See* 18 James Wm. Moore et al., *Moore's Federal Practice* § 130.30, at 130-26.5 (3d ed. 1997); *Kern*, 303 F.2d at 340. And the important policies underlying the Rule would lose their force if the Rule were not followed in recognizing courts. *See* Lilly, *supra*, at 320 ("a dismissal with prejudice" under Rule 41(b) "would be largely ineffective if the plaintiff could renew his claims in another court"); Burbank, *supra*, at 780 ("the federal interest in uniform federal rules" governing the "on the merits" question is "sufficiently strong to rule out resort to state law"). As a result, even if state law should govern other aspects of preclusion analysis not controlled by a Federal Rule – such as the scope of the claims or causes of action precluded or the rules governing mutuality or privity of the parties – Rule 41(b) determines whether a federal dismissal "operates as an adjudication upon the merits" for preclusion purposes. *See* 18 Wright & Miller § 4472, at 726 ("Some res judicata results are controlled by the rules of civil procedure, which should be binding on all courts.").

iv. Erie analysis. *Erie* analysis is irrelevant in cases involving a Federal Rule. But even if *Erie*, rather than *Hanna*, supplied the relevant framework, *Erie* would not compel the result urged by Semtek here. To begin with, Semtek places excessive weight on whether application of Rule 41(b) would change the outcome from the one that would prevail in state court. *See* Pet. Br. 15-16, 21-22, 38. "'Outcome-determination' analysis was never intended to serve as a talisman," and "*every* procedural variation is 'outcome-determinative'" in the sense urged by Semtek. *Hanna*, 380 U.S. at 466-67, 468; 19 Wright & Miller § 4504, at 30-31. The relevant question under *Erie* is not whether application of the state law rule would change the outcome, but whether its application would "have *so important an effect* upon the fortunes of one or both of the litigants that failure to apply it

would unfairly discriminate against citizens of the forum State, or be likely to cause a plaintiff to choose the federal court." *Gasperini*, 518 U.S. at 428 (emphasis added) (internal quotation marks and alterations omitted).[22]

Semtek contends that the California rule entails substantial implications for forum-shopping and equitable administration of the law because a dismissal on limitations grounds in a California court would not preclude the action in Maryland. *See* Pet. Br. 21-22. In fact, however, "the difference between the two rules would be of scant, if any, relevance to the choice of a forum." *Hanna*, 380 U.S. at 469. Accepting Semtek's rationale would require presuming not only that parties base the selection of a forum on the preclusive effect of a possible dismissal, but also that they take into consideration the particular grounds on which the action might be dismissed, and consider further whether federal and state preclusion rules attach different preclusive consequences to any dismissal that might be entered on those grounds. And because the federal rule in issue, Rule 41(b), generally allows district courts discretion to tailor the preclusive effect of a dismissal to the circumstances of the case, the parties normally will not know in advance whether the federal and state rules in fact entail different outcomes.

---

[22] It bears noting that the circumstances of this case do not implicate *Erie*'s core concerns. Because the case involves an out-of-state defendant's decision whether to remove an action to federal court, it does not raise concerns about forum shopping or inequitable administration of the law: both the plaintiff and defendant have a right to have the case heard in federal court – the former by filing there and the latter by removing. *See* 17 James Wm. Moore et al., *Moore's Federal Practice* § 124.06[1], at 124-37 (3d ed. 1997) ("The forum-shopping that concern[s] the Court is the unfairness of providing plaintiffs who can sue in federal court an advantage unavailable to non-diverse plaintiffs who must proceed in state court, or unavailable to defendants who have no choice.").

Unlike the typical *Erie* situation, moreover, the choice of forum would not affect the outcome in that case itself. The parties instead would have to look further into the future, as the forum choice could make a difference only in any subsequent action. What is more, because in this case a subsequent action in California would have been precluded even if a California state court heard the initial suit, *see* note 19 *supra*, the forum choice could have an outcome-determinative effect only in the event of a subsequent action filed *in a different state*. It is unlikely that litigants base their choice of a forum to any meaningful extent on the possibly disparate preclusive consequences of a conceivable dismissal that could be entered on a specific ground in a potential subsequent action that might be filed in a different state.

Finally, whatever may be the implications of the California rule for forum-shopping and equitable administration of the law, the substantial federal interests reflected in Rule 41(b) would compel application of the Rule, even assuming *Hanna* itself did not. *See Gasperini*, 518 U.S. at 437 (factoring federal interests into *Erie* analysis); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537-38 (1958) (same); Erichson, *supra*, at 1007 ("Even if concerns of forum-shopping and vertical uniformity might lead one to consider application of state law under *Erie*, . . . [i]f there is a countervailing federal interest, then courts must consider whether that federal interest overrides application of the state rule."). Whereas *Erie* questions typically involve a choice between state and federal rules that apply during the course of litigating an action, Rule 41(b) takes effect upon entry of a dismissal. "A critical event – the entry of judgment by an arm of the federal sovereign – provides the dominant federal interest, even in the diversity context." Lilly, *supra*, at 325. As a result, although *Erie* analysis and the weight of state and federal interests are irrelevant when a Federal Rule covers the point in dispute, an accurate understanding of those

interests and a proper application of *Erie* analysis would lead to the same conclusion: Rule 41(b) controls.

C. Rule 41(b) Does Not Exempt Dismissals on Statute of Limitations Grounds From "On The Merits" Treatment.

Semtek's fall-back position is that even if Rule 41(b) controls, the Rule "does not accord preclusive effect to the *type* of dismissal entered here: a dismissal under a statute of limitations." Pet. Br. 44. In Semtek's view, limitations dismissals fall within the exception from "on the merits" treatment for dismissals entered "for lack of jurisdiction." Fed. R. Civ. P. 41(b). That reasoning once again is at odds with the straightforward text of the Rule.

1. Semtek principally relies on *Costello v. United States*, 365 U.S. 265 (1961), which construed Rule 41(b)'s exception for "lack of jurisdiction" in the context of successive denaturalization proceedings. This Court ordered dismissal of the first proceeding because the government had failed to file an affidavit of good cause with the complaint, a prerequisite to initiation of denaturalization proceedings under applicable federal law. 356 U.S. 256 (1958). The district court's dismissal on remand did not state whether the judgment was with prejudice. The government then instituted a second proceeding, this time with the required affidavit, and the case again came before this Court. The Court held that "a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b)," and so does not have claim preclusive effect. 365 U.S. at 285. According to the Court, the "lack of jurisdiction" exception "encompass[es] those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." *Id.*

a. Semtek's effort to apply *Costello* to statute of limitations dismissals is unavailing. To begin with, Semtek wholly

misapprehends the implications of its argument, which it perceives are as follows: "[U]nder *Costello*, Rule 41(b) does not deem the California's district court's dismissal of Semtek's complaint to be res judicata as to Semtek's Maryland action. Instead, applying *Dupasseur*, the Maryland courts should have looked to California law." Pet. Br. 50.

Semtek's conclusion cannot follow from its premise. Application of *Costello* would not mean that Rule 41(b) would drop out of the picture and that recognizing courts could then look to state law. Instead, Rule 41(b) would still apply, but its blanket exception for dismissals for "lack of jurisdiction" – rather than its default rule – would control. The result would be that *no* federal court dismissal on statute of limitations grounds could *ever* be "on the merits" for purposes of res judicata, including in federal question cases, and including in diversity cases even if the rules of the state in which the diversity court sits provide that limitations dismissals *are* or can be "on the merits" (as appears to be the case in a majority of states, *see infra* at 41). Contrary to Semtek's assumption, in short, *Costello* does not provide a bridge to state law.

b. Semtek also errs on the antecedent question whether *Costello* has any implications for limitations dismissals. This Court, specifically relying on Rule 41(b), established in a subsequent decision that "[t]he rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: *as a judgment on the merits*." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) (citing Fed. R. Civ. P. 41(b)) (emphasis added). The Court's reliance on Rule 41(b) for that conclusion in *Plaut* necessarily rules out any reliance on the prior decision in *Costello* for the opposite position, *i.e.*, that no limitations dismissal can ever constitute "a judgment on the merits" under Rule 41(b).

Indeed, there had long been a "clear trend toward giving claim-preclusive effect to dismissals based on statutes of limitations" by the time of the Court's statement in *Plaut*. *Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) (per Breyer, J.). And the law in a majority of states appears to be that statute of limitations dismissals are (or at least can be) "on the merits."[23] There is thus no warrant for adopting a strained construction of Rule 41(b) under which no federal limitations dismissal could ever be "on the merits."

Costello would have no implications for this case even otherwise. The courts that have addressed the question have

---

[23] *See Eastern Credit Ass'n v. Estate of Braxton*, 215 A.2d 485, 486-87 (D.C. 1965); *Allie v. Ionata*, 503 So.2d 1237, 1242 (Fla. 1987); *Hill v. Wooten*, 279 S.E.2d 227, 228 (Ga. 1981); *Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199, 1204-05 (Ill. 1996); *Creech v. Town of Walkerton*, 472 N.E.2d 226, 228 (Ind. Ct. App. 1984); *Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 399 (Iowa 1998); *Livingston v. Estate of Bias*, 673 P.2d 1197, 1199-1200 (Kan. Ct. App. 1984); *Dennis v. Fiscal Court*, 784 S.W.2d 608, 609 (Ky. Ct. App. 1990); *Guidry v. Bayly, Martin and Fay*, 545 So.2d 567 (La. Ct. App. 1989); *Beegan v. Schmidt*, 451 A.2d 642, 644 (Me. 1982); *Fluhr v. Allstate Ins. Co.*, 447 N.E.2d 1254, 1255 (Mass. App. Ct. 1983); *Rose*, 778 F.2d at 77 (applying Massachusetts law); *Nitz. v. Nitz.*, 456 N.W.2d 450, 452-53 (Minn. Ct. App. 1990); *Jordan v. Kansas City*, 929 S.W.2d 882, 886 (Mo. Ct. App. 1996); *First Call, Inc. v. Capital Answering Serv., Inc.*, 898 P.2d 96, 96-97 (Mont. 1995); *Opinion of the Justices*, 558 A.2d 454, 458 (N.H. 1989); *DeVargas v. Montoya*, 796 F.2d 1245, 1249 (10th Cir. 1986) (construing New Mexico law), *overruled on other grounds Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987); *Smith v. Russell Sage College*, 429 N.E.2d 746, 750 (N.Y. 1981); *Haislip v. Riggs*, 534 F. Supp. 95, 99 (W.D.N.C. 1981); *LaBarbera v. Batsch*, 227 N.E.2d 55, 63 (Ohio 1967); *Corrado v. Providence Redevelopment Agency*, 320 A.2d 331, 332 n.3 (R.I. 1974); *Foran v. USAA Casualty Ins. Co.*, 427 S.E.2d 918, 919 (S.C. Ct. App. 1993); *Partee v.Phelps*, 840 S.W.2d 512, 515 (Tex. App. 1992); *Discount Homes, Inc. v. McFarlane*, 16 Va. Cir. 306, 308 (Va. Cir. Ct. 1989); *Shupe v. Ketting*, No. 18145-4-III, 2000 Wash. App. LEXIS 1782, at *12-13 (Wash. Ct. App. 2000); *Gillespie v. Johnson*, 209 S.E.2d 143, 145 (W. Va. 1974); *Gardner v. LaFollette*, 343 N.W.2d 830 (Wis. Ct. App. 1983).

found that limitations dismissals do not fall within the "lack of jurisdiction" exception notwithstanding *Costello*. *See Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1181 (4th Cir. 1989); *PRC Harris, Inc. v. Boeing*, 700 F.2d 894 (2d Cir. 1983).[24] A failure to file suit within the statute of limitations is not a "failure to comply with a precondition requisite to the Court's going forward." *Costello*, 365 U.S. at 285. *Costello* interprets the "lack of jurisdiction" exception to encompass "curable defects," *i.e.*, a failure to satisfy a precondition that can "be remedied by occurrences subsequent to the original dismissal." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (per Scalia, J.) (emphasis omitted); *see Rose*, 778 F.2d at 79-80 (per Breyer, J.) (exception for "lack of jurisdiction" covers "defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again"). The expiration of a limitations period by nature cannot be remedied by subsequent events: the lapse of time is not curable. *Costello* therefore has no application here.[25]

2. Semtek is left only with an inference it draws from a string citation in the Advisory Committee notes to Rule 41(b). The argument focuses on the Committee's notes in

---

[24] Semtek relies on the district court decision in *Burgess v. Cohen*, 593 F. Supp. 1122 (E. D. Va. 1984), *see* Pet. Br. 47, but that ruling was superseded by the Fourth Circuit's subsequent decision in *Shoup*, 872 F.2d at 1178.

[25] Semtek's emphasis on whether Lockheed was put to the burden of preparing a defense, *see* Pet. Br. 49, proves too much. Dismissals for failure to state a claim often precede meaningful discovery and factual development, but they nonetheless generally constitute "on the merits" judgments for preclusion purposes. *See Plaut*, 514 U.S. at 228; *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981). At any rate, resolution of statute of limitations questions often requires substantial discovery and factual development. Allegations that fraudulent concealment should foreclose reliance on a statute of limitations defense, for instance, will often entail discovery and litigation.

connection with the 1963 amendment adding dismissals for failure to join an indispensable party to the list of dismissals exempted from "on the merits" treatment. A string citation in the notes identifies a number sources supporting the proposition that dismissals for failure to join a party should not bar a subsequent action, including the Restatement (First) Judgments § 49, comm. a, b (1942). Semtek considers the "Advisory Committee's reference to comment a of Section 49 of the Restatement" to be "highly revealing," Pet. Br. 48, and to "indicate beyond a shadow of a doubt that Rule 41(b) was not intended to cover a statute-of-limitations dismissal," *id.* at 47.

To the extent the citation of the Restatement comments in the Committee notes is "highly revealing," it is for the opposite reason. To be sure, *one* of the two cited Restatement comments contains a discussion about statute of limitations dismissals that Semtek repeats in its brief. But *both* of the cited comments specifically discuss the preclusive consequences of a dismissal for failure to join a party, the specific issue addressed by the 1963 amendments. *See* Restatement (First) Judgments § 49 comm. a, b. In fact, the two comments together submit that a dismissal for failure to join a party should have issue preclusive but not claim preclusive effect, exactly the result brought about by the amendments. Semtek thus would have the Court believe that the citation of the two Restatement comments was intended not to refer to the discussion in both comments providing direct support for the specific amendment at issue, but instead to incorporate into the Rule *sub silentio* the discussion in *one* of the comments about an unrelated subject. That is implausible.

The 1963 amendments are "highly revealing" in a broader sense. They illustrate that the proper way to add dismissals on a particular ground to the list of dismissals exempted from "on the merits" treatment is to amend the Rule, not to give the plain terms of the Rule an unnatural reading.

If the Advisory Committee intended to prescribe a distinct treatment of limitations dismissals, it would have said so explicitly, just as it did in 1963 with dismissals for failure to join an indispensable party. *Cf. Business Guides*, 498 U.S. at 545 ("Had the Advisory Committee intended to limit the application of the certification standard" in Rule 11, "it would surely have said so."). And even if it were desirable to exempt all limitations dismissals from "on the merits" treatment as a policy matter, "this Court will not reject the natural reading of a rule or statute in favor of a less plausible reading, even one that seems to . . . achieve a better result." *Id.* at 547. The most "natural reading" of Rule 41(b) – indeed, the only possible reading – is that limitations dismissals "operate as an adjudication upon the merits" unless the rendering court "otherwise specifies." Fed. R. Civ. P. 41(b).

D. Rule 41(b) Is Valid Under The Rules Enabling Act And The Constitution.

When a Federal Rule "cover[s] the point in dispute," *Hanna*, 380 U.S. at 470, the only remaining question is whether the Rule reflects a valid exercise of rulemaking authority under the Constitution and the Rules Enabling Act, 28 U.S.C. § 2072. *See Burlington Northern*, 480 U.S. at 4-5. Semtek at no point suggests that Rule 41(b) is invalid under either the Enabling Act or the Constitution. To the contrary, Semtek's fallback argument under the Rule necessarily presumes the Rule's validity. There is thus no contention before the Court that the Rule exceeds the scope of rulemaking authority under the Constitution or the Enabling Act.

Such a contention would fail in any event.[26] A challenge to the validity of a Federal Rule of Civil Procedure "has a large hurdle to get over," and can "succeed 'only if the Advi-

[26] Any challenge to Rule 41(b) under the Enabling Act or the Constitution of course necessarily would call the Rule's validity into question in all cases, not just diversity cases.

sory Committee, this Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions.'" *Business Guides,* 498 U.S. at 552 (quoting *Hanna*, 380 U.S. at 471). "Rules regulating matters 'which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either,' . . . satisfy [the] constitutional standard." *Burlington Northern*, 480 U.S. at 5 (quoting *Hanna*, 380 U.S. at 472). And "Rules which incidentally affect litigants' substantive rights do not violate" the Rules Enabling Act if "reasonably necessary to maintain the integrity" of the Federal Rules. *Id.* No Federal Rule has been invalidated under those standards, *see* 19 Wright & Miller § 4504, at 48, and no court has suggested that Rule 41(b) should be the first.

Rule 41(b) at least is "rationally capable of classification" as procedural.[27] The "rules of practice and procedure may and often do affect the rights of litigants," but Rule 41(b) "does not operate to abridge, enlarge, or modify the rules of decision by which [a] court will adjudicate [substantive] rights." *Hanna*, 380 U.S. at 465 (internal quotation marks omitted). The Rule plays no role in the substantive determination whether a dismissal should be awarded, but controls the preclusive effect of a dismissal entered for independent reasons. The Rule thus does not define the "rights and duties recognized by substantive law," but comprises part of "the judicial process for enforcing [those] rights and

[27] The Advisory Committee specifically addressed when promulgating Rule 41(b) whether the Rule "is really procedural" given that it "attempts to state the effect of a dismissal." American Bar Association, Proceedings of the Institute on Federal Rules, Cleveland, Ohio, 310 (1938) (remarks of Edgar Bronson Tolman, member of the Advisory Committee on Rules of Civil Procedure). The Committee concluded that the Rule was "procedural" based on an English decision "involv[ing] that very point." *Id.*; *see id.* at 306.

duties" and for "administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). In addition, Rule 41(b) promotes the integrity of the Federal Rules: preclusion rules work hand in hand with other procedural rules to control litigation in the forum. *See, e.g.*, Erichson, *supra*, at 961-62. Rule 41(b) thus presents no difficulty under the Rules Enabling Act or the Constitution. *See* 8 James Wm. Moore et al., *Moore's Federal Practice* § 41.02 (3d ed. 2000)

II. THE CONCLUSION THAT RULE 41(b) CONTROLS THE ISSUE IN THIS CASE IS UNAFFECTED BY *DUPASSEUR v. ROCHEREAU*.

Semtek does not contend that if Rule 41(b) covers the issue in this case and is valid, *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), nevertheless mandates a different result. Accordingly, the threshold and pivotal issue in this case concerns the applicability of Rule 41(b): if the Rule applies and is valid, that is end of the matter. *Dupasseur* has no bearing on those questions, and this case therefore raises no questions of *stare decisis*.[28]

---

[28] Semtek's petition for certiorari presents the question whether *Dupasseur* is "still good law," and asks further, "what should be the res judicata effect of a statute of limitations dismissal in a diversity suit" if "*Dupasseur* is overruled or modified by this Court?" Pet. for Cert. i. The "res judicata effect of a statute of limitations dismissal in a diversity suit," as we have explained, is determined by Rule 41(b) – at least in respect to the "on the merits" question. Contrary to Semtek's assumption, however, that conclusion does not entail "overruling or modifying" *Dupasseur* or determining that *Dupasseur* is not "good law." The question whether a prior decision remains "good law" can be tested only in a case involving circumstances that the prior decision intends to control. *Dupasseur*, as we explain here, simply did not intend to establish the controlling standard when a Federal Rule of Civil Procedure is on point. Indeed, *Dupasseur* could not have done so. It is not that *Dupasseur* is no longer "good law"; it is that *Dupasseur* does not purport to control the resolution of this case.

1. *Dupasseur* arose at a time when federal courts applied state procedural law under the terms of the now-obsolete Conformity Act, and the decision was a direct product of – and is inextricably linked with – that period. *See* Degnan, *supra*, at 756-57, 768-69. The question in *Dupasseur* was whether a previous federal court proceeding was *in rem*, in which case it would bind nonparties (like Dupasseur) in a subsequent action. In the course of resolving that issue, the Court observed that the prior judgment had been entered in a diversity case, that the court's "proceedings were had in accordance with the forms and course of proceeding in the State courts" under the Conformity Act, and that the judgment "therefore" should be accorded the same preclusive effect as a "judgment[] of the State courts in a like case and under similar circumstances." *Dupasseur*, 88 U.S. (21 Wall.) at 135. The Court went on to find that the proceeding was not *in rem*. *Id.* at 137-38.

Dupasseur's understanding of the preclusive effect of a diversity judgment arose directly out of the decision's historical context. At the time, the Conformity Act required federal courts to apply state rules of procedure in virtually all federal proceedings.[29] Because the "proper scope of judgments is determined in large part by the procedures leading to their rendition," Degnan, *supra*, at 769, the Court naturally looked to state law when assessing the preclusive effect of a diversity judgment. *See id.* at 756-57; Restatement (Second) Judgments § 87 cmt. a ("Since procedural law largely determines the matters that may be adjudicated in an action, state law had to be considered in ascertaining the effect of a federal judgment" at the time of the Conformity Act.). *Dupasseur* did not address a choice between federal and state pre-

---

[29] The only exception was in equity proceedings, and those "elicited no special notice of the problem of the governing law." Restatement (Second) Judgments § 87 cmt. a.

clusion law – because of the Conformity Act, there was no well-developed body of federal preclusion law to speak of.[30]

All of that changed in 1938 with the promulgation of the Federal Rules of Civil Procedure, made possible by the repeal of the Conformity Act and enactment of the Rules Enabling Act. *See* Restatement (Second) Judgments § 87 cmt. a; Degnan, *supra*, at 757. Because *Dupasseur* was grounded in the application of state rules of procedure, it was essentially superseded by the establishment of the Federal Rules. *See* 18 Wright & Miller § 4472, at 732-33; Degnan, *supra*, at 768. In fact, since the adoption of the Federal Rules neither *Dupasseur* nor any other decision has been cited by this Court even once for the proposition that state law determines the preclusive effect of a diversity judgment.[31]

---

[30] *Deposit Bank of Frankfort v. Board of Councilmen*, 191 U.S. 499 (1903) is not to the contrary. *Deposit Bank* found that *Dupasseur* did not compel application of state law to determine the preclusive effect of a federal court judgment in a federal question case. *See id.* at 515-21. Although the Conformity Act applied to federal question cases, *Deposit Bank* does not call into question *Dupasseur*'s roots in the Act. The point here is that the use of state law procedures by the federal courts – and more particularly, the attendant paucity of independent federal procedures, including preclusion rules – led to the rule of *Dupasseur*, not that it compelled application of that rule in every circumstance.

[31] This Court has cited *Dupasseur* during that entire period only once for any reason, and that was in a footnote in support of the unrelated proposition that the res judicata effect accorded a federal judgment by a state court presents a federal question reviewable by this Court. *See Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129 n.1 (1941). Semtek's contention that the Court has implicitly reaffirmed *Dupasseur* through isolated statements in *Heiser v. Woodruff*, 327 U.S. 726 (1946), and *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971), *see* Pet. Br. 12 & n.7, is incorrect. For one thing, neither of those decisions addressed the preclusive effect of a diversity judgment. The statements in both *Heiser* and *Blonder-Tongue* pertain to the rules that should be applied by a *recognizing* diversity court when evaluating the preclusive effect of a prior judgment, not to the rules governing the preclusive effect of a *rendering* diversity court judgment in subsequent proceedings. *See* Degnan, *supra*, at 750-51. Even if *Heiser* and *Blonder-Tongue* addressed the issue in this case, the Court's treatment of the question as an open one – rather than one controlled by *Dupasseur* – is inconsistent with Semtek's reliance on those cases here.

That does not mean that state law can never control any aspect of the preclusive effect of a diversity judgment. It means instead that any decision selecting state rules over federal rules would come about not because of *Dupasseur*, but because of independent analysis under *Erie* and *Hanna*. *See* Restatement (Second) Judgments § 87 cmt. b; 18 Wright & Miller § 4472, at 733 ("the old rule should not be perpetuated without careful reexamination," particularly where "the civil rules" are "clearly intended to require preclusion").

2. *Dupasseur* can have no application where one of the Federal Rules is on point. The Federal Rules have "the force of a federal statute," *Sibbach*, 312 U.S. at 13, and the Rules Enabling Act specifically provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect," 28 U.S.C. § 2072(b). *Dupasseur* established a rule of federal common law, binding in all state (and federal) courts, directing that the preclusive effect of a diversity judgment is determined by the law of the state in which the diversity court sits. To the extent the common law rule of *Dupasseur* is "in conflict with" a subsequently promulgated Federal Rule, *Dupasseur* is "of no further force or effect." 28 U.S.C. § 2072(b); *see Penfield Co. v. S.E.C.*, 330 U.S. 585, 589-90 n.5 (1947) ("Where a Rule of Civil Procedure conflicts with a prior statute, the Rule prevails.").

This case thus presents no questions of *stare decisis* in respect to *Dupasseur*, and turns instead exclusively on the terms of Rule 41(b). *See Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981) ("[O]nce Congress addresses a subject, even a subject previously governed by federal common law, . . . the task of the federal

courts is to interpret and apply statutory law, not to create common law."). As we have explained, Rule 41(b) controls the circumstances in which a federal court dismissal is "an adjudication upon the merits," Fed. R. Civ. P. 41(b), and it establishes that the dismissal of Semtek's California action by the diversity court was "upon the merits" for purposes of claim preclusion.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

DAVID M. CHRISTENSON
LOCKHEED MARTIN
CORPORATION
6801 Rockledge Drive
Bethesda, Maryland 20817
(301) 897-6127

FRANCIS B. BURCH, JR.
ANTHONY L. MEAGHER
PIPER MARBURY RUDNICK
& WOLFE LLP
6225 Smith Avenue
Baltimore, Maryland 21209
(410) 580-3000

MARTIN H. REDISH
PIPER MARBURY RUDNICK
& WOLFE LLP
203 North LaSalle Street
Chicago, Illinois 60601
(312) 368-4000

WALTER E. DELLINGER
(*Counsel of Record*)
PAMELA A. HARRIS
SRIKANTH SRINIVASAN
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

ROBERT E. WILLETT
RICHARD W. BUCKNER
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000

Counsel for Respondent

October 10, 2000